sanctions the Internal Security Act would be inadequate and ineffective to achieve its purpose which is "to provide for the internal security of Malaysia, preventive detention, the prevention of subversion, the suppression of organised violence against persons and property in specified areas of Malaysia, and for matters incidental thereto."

The fundamental right of equality before the law and to the equal protection of the law are not violated by the fact that the accused is charged under section 57(1)(b) of the Internal Security Act and not under section 8 of the Arms Act. Under article 145(3) of the Federal Constitution the Attorney-General has the power exercisable at his discretion to institute, conduct or discontinue criminal proceedings for any offence. It is up to the Attorney-General to decide if he would charge any person and under which law depending on the evidence available to him. The power relating to criminal proceedings as set out in article 145(3) is vested in the most high-ranking law officer in the country and as such it must be presumed that he would exercise his power fairly and in the best interests of justice. Therefore if the exercise of his power under article 145(3) is to be challenged it must be shown to the satisfaction of the court that in exercising his power the Attorney-General acted in bad faith or that he acted outside the scope of article 145(3) of the Federal Constitution. In the present case there is no evidence of bad faith on the part of the Attorney-General nor is there any suggestion that he acted beyond his power under article 145(3). The decision to charge the accused under the Internal Security Act and not under the Arms Act was a legitimate exercise of the Attorney-General's power under article 145(3) of the Federal Constitution and it cannot be challenged as unconstitutional.

Under article 121(1) of the Federal Constitution the High Court is vested with the judicial power of the Federation which means that the court has power to adjudicate in civil and criminal matters which are brought before the court. In criminal trials the High Court is empowered to pass sentence according to law and if the law prescribes a mandatory death sentence the High Court has no choice but to pass that sentence. The fact that the court has no alternative does not make the mandatory death sentence unconstitutional. In the case of *Ong Ah Chuan* v. *Public Prosecutor*[1] which went up on appeal from the Singapore Court of Criminal Appeal to the Privy Council Lord Diplock had this to say on mandatory death sentences –

> "There is nothing unusual in a capital sentence being mandatory. Indeed its efficacy as a deterrent may be to some extent diminished if it is not. At common law all capital sentences were mandatory; under the Penal Code of Singapore the capital sentence for murder and for offences against the President's person still is. If it were valid the argument for the appellants would apply to every law which imposed a mandatory fixed or minimum penalty even where it was not capital – an extreme position which counsel was anxious to disclaim."

The courts are concerned with the administration of law and they are obliged to administer the law as it is found in the statute books. Whether or not the death sentence is morally right or wrong is a matter not for the courts but for Parliament to decide. It may not be out of place however to mention here that in order to mitigate the extreme sentence of death there is provision for review by the Pardons Board and in suitable cases death sentences are commuted to life imprisonment and even to lesser terms of imprisonment.

In my view and for the reasons I have stated the constitutional validity of section 57(1)(b) of the Internal Security cannot be challenged. The Internal Security Act with all the provisions therein is perfectly valid and there is nothing in the Act which contravenes the Federal Constitution. I accordingly rule against the preliminary issue raised by the defence.

Order accordingly.

Solicitors: *Ngeow & Co.*

THONG CHUAN CHING & ANOR. v. TOSHIBA ELECTRONIC MALAYSIA SDN. BHD.

[O.C.J. (Vohrah J.) October 19, 1982]

[Kuala Lumpur – Civil Suit No. 141 of 1975]

Practice & Procedure – Non-compliance with Practice Rules – Inexcusable delay on plaintiffs' part – Action dismissed – R.H.C. 1980, O. 34 r. 3

The writ in this case was issued by the plaintiffs on January 23, 1975. It claimed against the defendants damages for breach of contract. This was followed by a Memorandum of Appearance dated March 13, 1975, a Statement of Defence dated April 5, 1975; an entry of action for trial dated April 6, 1976; and a Notice of trial dated April 7, 1976. All the said documents were filed but no date was

fixed by the court for hearing of the action. On May 18, 1979 Practice Note No. 1 of 1979 for the High Court ([1979] 2 M.L.J. lxxxiii) was issued. On June 1, 1980, the Rules of the High Court 1980 came into being. Neither the instructions of Practice Note No. 1 nor the stipulations of O. 34 r. 3 were complied with by the solicitors for the plaintiffs. As a result, the solicitors for the defendants had applied to the court to have the action dismissed for want of prosecution.

Counsel for the defendants submitted that the inexcusable delay had given rise to a substantial risk that a fair trial will not be possible and that the defendants were at risk of being severely prejudiced as a result. The defendants' two witnesses were no longer available, one having vanished without a trace and the other having passed away.

Held, dismissing the plaintiffs' action: the defence had been prejudiced by the inexcusable delay on the part of the plaintiffs. Having regard to the sequence of documents filed in this case as listed above, nothing would have been done by the solicitors for the plaintiffs but for the action by the defendants' solicitors rousing them from their slumber.

Cases referred to:

(1) *Vasudevan* v. *T. Damodaran & Anor.* [1981] 2 M.L.J. 150.

(2) *Toh Hock Thye & Ors.* v. *Toh Chwee Biow* [1982] 1 M.L.J. 152.

CIVIL SUIT.

C. Dass for the defendants/applicants.

J.G. Bernatt for the plaintiffs/respondents.

Cur Adv. Vult.

Vohrah J.: The writ in this case, endorsed with a claim for pecuniary damages for breach by the defendants of a catering contract to supply food to workers of the defendants, was issued by the plaintiffs on January 23, 1975 and was followed in chronological sequence by:

(i) a Memorandum of Appearance dated March 13, 1975;

(ii) a Statement of Defence dated April 5, 1975;

(iii) an Entry of Action for trial dated April 6, 1976; and

(iv) a Notice of Trial dated April 7, 1976.

All the above documents were filed under the Rules of the Supreme Court, 1957 but no date was fixed by the court for the hearing of the action. On May 18, 1979 Practice Note No. 1 of 1979 for the High Court at Kuala Lumpur was issued and the relevant instructions of the Practice Note read:

"7. It will be the duty of Solicitors to enter a cause for trial into one of the lists and at the same time stating that the:

(i) Bundle of Pleadings;

(ii) Agreed Bundle of Documents; and

(iii) Agreed Facts (if any) have been filed;

(iv) The estimated length of trial.

10. (i) The Solicitor shall inform the Registry by ordinary letter that his case was on the aforesaid Fixing List (as item no .....) and that no date of hearing was fixed or otherwise taken out of the list.

(ii) He should state therein that the requirements of para 7 above have been complied with and indicate the appropriate list his case should be entered and the approximate length of trial ....."

On June 1, 1980 the Rules of the High Court 1980 came into being and Order 34 rule 3 stipulates:

"(1) In order to set down for trial an action, the party setting it must deliver to the Registrar, by post or otherwise, a request in Form 63 that the action may be set down for trial together with two bundles (one of which shall serve as the record and the other be for the use of the Judge) consisting of one copy of each of the following documents, this is to say –

(a) the writ;

(b) the pleadings (including any affidavits ordered to stand as pleadings), any notice or order for particulars and the particulars given; and

(c) all orders made on the summons for directions.

(2) Such bundle must be bound up in the proper chronological order and have indorsed thereon the names, addresses and telephone numbers of the solicitors for the parties or, in the case of a party who has no solicitors, of the party himself."

Neither the instructions of Practice Note No. 1 nor the stipulations of Order 34 rule 3 were complied with by the solicitors for the plaintiffs and, as a result, the solicitors for the defendants have now applied to the court to have the action dismissed for want of prosecution.

Mr. Dass for the defendants, in making the application, has contended that there has been inordinate or inexcusable delay on the part of the plaintiffs or on that of their solicitors which has given rise to a substantial risk that a fair trial will not be possible and that the defendants are at risk of being severely prejudiced as a result because the defendants' two witnesses are now not available, one having vanished without trace and the other having passed away in May 1977. Mr. Dass has drawn my attention to two recent decisions

of the Federal Court which have a bearing on this matter.

In the case of *Vasudevan* v. *T. Damodaran & Anor*,[1] Abdoolcader J., in reviewing the authorities, enunciated the principles relating to the exercise of the court's power to dismiss an action for want of prosecution as follows (at page 151):

"We would specifically refer to the propositions enunciated by Salmon L.J. in *Allen* (at page 268) to the effect *inter alia* in relation to the inordinate delay being inexcusable that as a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable, and again with regard to the question of serious prejudice to defendants by the delay, that this may be prejudice at the trial of the issue between themselves and the plaintiff or between each other or between themselves and third parties, and that as a rule the longer the delay, the greater the likelihood of serious prejudice at the trial. The decision of the English Court of Appeal in *Biss* v. *Lambeth, Southwark* and *Lewisham Area Health Authority* (Teaching) (distinguishing *Birkett*) on a point under the English Limitation Acts, 1939 to 1975 not material for the purposes of the present appeal, is to the effect that in determining whether the delay after the writ has been issued is substantial, the court has to consider whether the delay has prejudiced both a fair trial and the defendants, and in considering the prejudice to the defendants, the delay after the issue of the writ has to be considered against the delay before issue, and whether such delay has substantially prejudiced the defendants.

We would draw particular attention to the judgement of Lord Denning M.R., stating (at page 389) that prejudice to a defendant by a plaintiff's delay is not limited to the death or disappearance of witnesses or their fading memories or in the loss or destruction of records since there is much prejudice to a defendant in having an action hanging over his head indefinitely, not knowing when it is going to be brought to trial."

In the second case of *Toh Hock Thye & Ors.* v. *Toh Chwee Biow*[2], Salleh Abas F.J., delivering the judgement of the Federal Court, re-affirmed the above principles in the following words at p. 153:

"Counsel for both sides cited to us many authorities including *Vasudevan* v. *Damodaran & Anor.*, a recent decision of a different panel of this court. We accept the statement of the law stated by Abdoolcader J. who wrote the judgement of this court as being correct. We add that not unmindful of the difficulties experienced by the Court of Appeal in England in *Biss* v. *Lambeth* and the Chancery Division in *Joyce* v. *Joyce* in applying the House of Lord's decision in *Birkett* v. *James* we propose for the purpose of this appeal to state the principle which would guide us in deciding this appeal to be thus – that the plaintiff's action is liable to be dismissed for want of prosecution when the court is satisfied that (1) the plaintiff's default has been intentional and contumelious or (2) the plaintiff or his lawyer is guilty of such inordinate and inexcusable delay that the defendant has been prejudiced by it."

Mr. Bernatt for the plaintiffs, has, however, submitted that if there has been any delay it is only with effect from May 18, 1979 when the Practice Note was issued and that, as I understand him, this delay is not inordinate or inexcusable as he was not aware of the Practice Note and that in any event only one of the defendants' principal witnesses is not traceable whilst the death of the other, who was the managing director of the defendant company, would make no difference to the trial as, ostensibly, the defendants could be represented by the new managing director. I am unable to accept that the lack of awareness on the part of solicitors, without more, is sufficient justification to render the delay excusable. I am also of the view that the defence has been prejudiced by this delay. In my judgement, having regard to the sequence of documents filed in this case as listed above, nothing would have been done by the solicitors for the plaintiffs but for the action by the defendants' solicitors rousing them from their slumber. It seems to me to be a clear case of inordinate and inexcusable delay on the part of the plaintiffs' solicitors. Accordingly, this action must be dismissed for want of prosecution with costs of the application and of defending the suit to the defendants.

Action dismissed.

Solicitors: *Shook Lin & Bok; Baharuddin, Bernatt Tan & Ker.*

KULDIP SINGH & ANOR. v. LEMBAGA LETRIK NEGARA & ANOR.

[O.C.J. (Wan Hamzah J.) November 1. 1982]
[Kuala Lumpur – Civil Suit No. 2638 of 1976]

Land Law – Sale and Purchase Agreement – Cheque of $46,000 by purchasers sent to their solicitor as stakeholders – Purchasers' solicitor absconded with money – Whether purchasers should bear loss.

Land Law – "Stakeholders" – Meaning of.

The plaintiffs in this case sought to purchase a house from the second defendant. The plaintiffs instructed their solicitor, Brar, to draw a sale and purchase agreement. The said agreement was executed by the parties on May 26, 1976. The plaintiffs sought to finance the purchase partly by means of a loan from their employer, the first